

The Law Firm

Fleming . Ruvoldt PLLC

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November 22, 2017

Via ECF

Honorable Richard M. Berman, U.S.D.J.
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Courtroom 17B
New York, New York 10007

MEMO ENDORSED

P 3

Re: U.S.A. v. Reza Zarrab, et al.
U.S. District Court for the Southern District of New York
S4 15-cr-00867 (RMB)

Dear Judge Berman:

We respectfully submit this application to compel the testimony of FBI Special Agent Jennifer McReynolds pursuant to the Court's permission in court on November 21, 2017. On November 1, 2017, the defendant served a "*Touhy* Demand" in letter form on the United States Department of Justice ("the DOJ"), in accordance with 28 C.F.R. §§ 16.21-16.26. The *Touhy* Demand sought production of trial testimony from the case agent in this matter, Special Agent Jennifer A. McReynolds. On November 9, 2017, the defense submitted an affidavit further supporting the demand for Special Agent McReynolds's testimony. (See attached).

Both the letter and the affidavit make clear the nature, scope, and relevancy of the proposed testimony. As stated above, Special Agent McReynolds is the case agent in this matter. Additionally, she was present during the defendant's arrest at JFK Airport and interacted substantially with him there. Among other things, she interviewed him both before his arrest and thereafter. The relevance of her potential testimony is therefore patent. She also swore to the allegations in the Complaint. (As we have noted in previous papers, Agent McReynolds misidentified the voice of the Defendant on at least one of four recordings used to establish probable cause.) Nevertheless, on November 20, 2017, AUSA Lockard advised us that the FBI has rejected our request for the case agent's testimony. We have requested that the FBI send a written rejection, but wanted to make this application to compel testimony as soon as practicable. The DOJ has rejected the *Touhy* Demand as overly broad and insufficiently specific to enable the DOJ to determine the relevant areas of testimony.

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DATE FILED: 12/14/17

November 22, 2017

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The defendant believes that the so-called "*Touhy* Regulations" are unconstitutional in the context of a federal criminal proceeding. The Ninth Circuit Court of Appeals has held that *Touhy* regulations promulgated by the Department of Homeland Security violated due process in a criminal case by "failing to provide reciprocal discovery." *United States v. Bahamonde*, 445 F.3d 1225, 1229 (9th Cir. 2006) (reversing conviction where district court did not require testimony of agent who sat through trial for defendant's failure to comply with *Touhy*.)

Although the Second Circuit has not addressed this issue in a precedential opinion, lower courts in this Circuit regularly apply *Touhy* in federal criminal cases. See, e.g., *United States v. Huong Thi Kim Ly*, 798 F.Supp.2d 467, 476 (E.D.N.Y. 2011), *aff'd*, 507 F. App'x 12 (2d Cir. 2013) ("It is well-settled that a government employee may not be compelled to testify as to specific matters where appropriate agency authorization has not been given." (citing, *United States ex rel. Touhy*, 340 U.S. 462 (1951))); *United States v. Gonzalez*, No. 06 Cr. 542 (LAK) (S.D.N.Y. Oct. 20, 2009) (Oct. 20, 2009 Tr. (Dkt. No. 55) at 20, 25) (ruling that the defendant will "have to comply with [*Touhy* regulations] if [he] want[s] [law enforcement] witnesses" to testify, and stating that the court is "not going to force the government to produce [law enforcement] witnesses unless and until the *Touhy* regulations are complied with").¹

In *United States v. Eldridge*, 29015 WL 4878141 (W.D.N.Y. August 14, 2015), however, the District Court rejected a Government request for reconsideration of a prior ruling granting a defense motion for a subpoena to an Assistant United States Attorney for trial testimony on what the Court called "narrow topics" that were "relevant and appropriate," without requiring strict compliance with the DOJ's *Touhy* Regulations. That ruling should be followed here. Without waiving the argument of unconstitutionality, but in light of the pendency of the trial, the defendant now seeks the intervention of the Court to compel the testimony of Special Agent McReynolds, the case agent, as a defense witness if she is called.

Respectfully yours,

/s/ Cathy A. Fleming

Cathy A. Fleming

cc: All Counsel of Record

¹ Other circuit courts have likewise concluded that *Touhy* applies in federal criminal cases. See, for example, *United States v. Lyimo*, 574 F. App'x 667, 671 (6th Cir. 2014); *United States v. Baker*, 496 F. App'x 201, 203 (3d Cir. 2012); *United States v. Soriano-Jarquin*, 492 F.3d 495, 504 (4th Cir. 2007); *United States v. Wallace*, 32 F.3d 921, 929 (5th Cir. 1994); *United States v. Bizzard*, 674 F.2d 1382, 1387 (11th Cir. 1982).

Defense application denied.
The Court agrees with Judge
Kaplan's ruling in U.S. v
Gonzalez, cited at p2 above.
It applies equally in U.S. v
Atilla.

SO ORDERED:

Date: 12/14/17

Richard M. Berman

Richard M. Berman, U.S.D.J.

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November 9, 2017

Via Federal Express

Kenneth A. Blanco, Esq.
Acting Assistant Attorney General
Criminal Division
United States Department of Justice
Room 2107
950 Pennsylvania Ave., NW
Washington DC 20530-0001

Re: U.S.A. v. Reza Zarrab, et al.
U.S. District Court for the Southern District of New York
S4 15-cr-00867 (RMB)

Dear Mr. Blanco:

This firm is co-counsel to defendant Mehmet Hakan Atilla in the above matter. On his behalf, we are submitting this letter as a formal demand under the *Touhy* regulations, 28 C.F.R. §16.21-§16.26, for production from the Metropolitan Correctional Center in Manhattan, New York and from the Metropolitan Detention Center in Brooklyn, New York of copies of (a) the visitor log, including legal visitor log, for inmate Reza Zarrab, a/k/a Riza Sarraf from January 1, 2017 until October 31, 2017 and (b) all audio recordings of telephone communications initiated by Reza Zarrab ("Zarrab Communications") between March 27, 2017 and April 4, 2017, including but not limited to Zarrab Communications placed through the telephone accounts of inmates other than Zarrab. The documents are needed in connection with the trial in the above matter, which is scheduled commence with jury selection on November 20, 2017.

I am also submitting this letter and the accompanying Affidavit in further support for our November 1, 2017 request (the "November 1 Letter") for the trial testimony of Special Agent ("SA") Jennifer McReynolds of the Federal Bureau of Investigation.

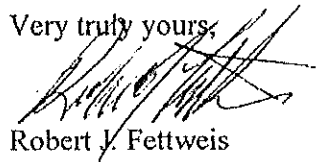
November 9, 2017

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In submitting this demand, we do not waive the defendant's assertion that the *Touhy* regulations are unconstitutional and/or inapplicable within the context of a federal criminal proceeding.

The materiality and relevance of the testimony of SA McReynolds is set forth in the November 1 Letter. The defendant may seek to call other Department of Justice witnesses to testify at trial depending upon the testimony, documentary evidence and *Jencks* material produced at or just prior to the trial. Counsel for the defendant continues to interview prospective witnesses for the trial and reserves the further right to supplement this request as new information is learned.

Very truly yours,



Robert J. Fettweis

Cc: By Email:
Victor Rocco
Thomas Thornhill
David Rosenfield

Assistant United States Attorneys:
Michael D. Lockard
Sidhardha Kamaraju
David W. Denton, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

REZA ZARRAB, et al.

Defendants.

S4 15-cr-00867 (RMB)

**AFFIDAVIT OF
ROBERT J. FETTWEIS**

STATE OF NEW JERSEY)
) ss:
COUNTY OF BERGEN)

Robert J. Fettweis, of full age, being duly sworn according to law, deposes and says:

1. I am a member of the firm of Fleming Ruvoldt PLLC, co-counsel to defendant Mehmet Hakan Atilla ("Mr. Atilla") in the above matter. I am making this affidavit in support of the defendant's request to the United States Department of Justice ("DOJ") for the production of documents at trial in the above matter, and to supplement the prior request for the testimony of Special Agent ("SA") Jennifer McReynolds of the Federal Bureau of investigation. Trial is scheduled to commence with jury selection on November 20, 2017.

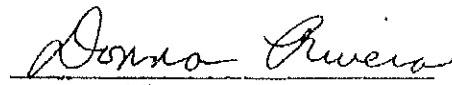
2. I have reviewed the accompanying November 9, 2017 letter from this firm to Kenneth A. Blanco, Acting Assistant Attorney General of the Criminal Division of the DOJ. The documents sought therein are, I believe, material and relevant to the defense of Mr. Atilla.

3. I have also reviewed the November 1, 2017 letter to Mr. Blanco regarding the proposed trial testimony of SA McReynolds. A copy of that letter is attached as Exhibit A hereto.

I believe the letter correctly sets forth the factual basis for and summary of the proposed testimony. I further believe that the proposed testimony would be material and relevant to Mr. Atilla's defense.


ROBERT J. FEITWEIS

Sworn to and subscribed before
me this 7th day of November, 2017


Notary Public

DONNA L. RIVERA
NOTARY PUBLIC OF NEW JERSEY
Comm. # 50052992
My Commission Expires 1/19/2022

EXHIBIT A

The Law Firm

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November 1, 2017

By Federal Express

Kenneth A. Blanco, Esq.
Acting Assistant Attorney General
Criminal Division
United States Department of Justice
Room 2107
950 Pennsylvania Ave., NW
Washington DC 20530-0001

Re: U.S.A. v. Reza Zarrab, et al.
U.S. District Court for the Southern District of New York
S4 15-cr-00867 (RMB)

Dear Mr. Blanco:

This firm is co-counsel to defendant Mehmet Hakan Atilla in the above matter. On his behalf, we are submitting this letter as a formal demand under the *Touhy* regulations, 28 C.F.R. §16.21-§16.26, for testimony at trial from Federal Bureau of Investigation Special Agent ("SA") Jennifer McReynolds. In submitting this demand, we do not waive the defendant's assertion that the *Touhy* regulations are unconstitutional and/or inapplicable within the context of a federal criminal proceeding. We simply make a *Touhy* request for expedition.

The defendant may seek to call other Department of Justice witnesses to testify at trial depending upon the testimony, documentary evidence and Jencks material produced at or just prior to the trial, as well as upon hearing Government witnesses testify at trial. Counsel for the defendant continues to interview prospective witnesses for the trial and reserves the further right to supplement this request as new information is learned.

November 1, 2017

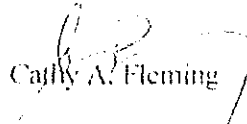
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A. Requested Testimony

SA McReynolds swore to the affidavit for the issuance of the criminal Complaint that led to the arrest of Turkish citizen Atilla on March 27, 2017 at JFK Airport in New York. She is the case agent who has worked on the case. Thus, she has extensive knowledge of the allegations in this case. In her affidavit, she set forth in some detail the purported factual basis for the defendant's arrest. She interacted substantially with him at the airport prior to his arrest and participated in interviewing him both before his arrest and thereafter.

Jury selection in this matter is currently scheduled for November 21, 2017. We therefore seek your earliest attention to this demand.

Very truly yours,


Cathy A. Fleming

cc: By Email:
Victor Rocco
Thomas Thornhill
David Rosenfield

Assistant United States Attorneys:
Michael D. Lockard
Sidhardha Kamaraju
David W. Denton, Jr.